Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Alain Beaulieu,

applicant,

and

International Association of Machinists and Aerospace Workers, Transportation District 140; Air Canada,

respondents.

Board File: 28409-C
Neutral Citation: 2011 CIRB **570**
February 21, 2011

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Mr. Graham J. Clarke and Ms. Louise Fecteau, Vice-Chairpersons.

Section 16.1 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this application without an oral hearing.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I–Nature of the Application and Background

[1] On September 22, 2010, the applicant, Mr. Alain Beaulieu, filed an application for reconsideration pursuant to section 18 of the *Code*, indicating that he was filing "two applications for reconsideration" of the Board's decision in *Jesse-Carl Gauthier*, 2010 CIRB 539 (RD 539), issued on August 23, 2010. RD 539 disposed of some 250 complaints alleging that the International Association of Machinists and Aerospace Workers (IAMAW or the union) had breached its duty of fair representation by concluding a Memorandum of Agreement (MOA) with Air Canada (the employer) and Aveos Fleet Performance Inc. (Aveos) on January 9, 2009. The Board had administratively consolidated these complaints into two files (27266-C and 27446-C), given that the allegations in support of the complaints were similar or identical. Mr. Beaulieu was a complainant in file no. 27266-C. RD 539 applied to all of the duty of fair representation complaints, including Mr. Beaulieu's.

[2] The impugned MOA addressed the transition of employment of certain Air Canada employees to Aveos as a result of the sale of Air Canada Technical Services (ACTS) in October 2007. The complaints alleged that the union had breached its duty of fair representation when it had negotiated and signed the MOA permitting the transfer of some employees to Aveos. In particular, they alleged that the MOA was in breach of the collective agreement, the union's by-laws and the *Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.) (*ACPPA*).

[3] In its decision, the Board stated the following:

> [65] Having reviewed all of the evidence, the Board finds no evidence that the union acted in a manner that was arbitrary, discriminatory or in bad faith. As noted, arbitrary action has been defined to include a "non-caring attitude" by a union toward the interests of its members. The evidence clearly indicates that the union's actions, starting with the December 14, 2006, unfair labour practice complaint, through the August 7, 2007, "freeze agreement" to the January 8, 2009, MOA were anything but "non-caring." It appears to the Board that the union's actions were focused on negotiating the best outcome for its members, to make the best of what they saw as the reality of the October 2007 sale of ACTS. The Board finds that this action by the union was the "antithesis" or opposite of arbitrary action.
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> [66] The Board finds no evidence that the union acted in a manner that was discriminatory. The Board finds no evidence that the union acted in bad faith.
>
> (RD 539)

II–Grounds Raised

[4] The grounds raised in support of the application for reconsideration are as follows:

- the Board dealt with all of the complaints in one decision;
- the Board failed to seek a legal opinion regarding the sale of Air Canada Technical Services to Aveos;
- the Board failed to hold a hearing;
- there appeared to be conflicts of interest involving two of the three Board panel members, who had worked for Air Canada in the past.

III–Analysis and Decision

A–Timeliness

[5] The Board notes that the reconsideration application was filed on September 22, 2010, which is more than 21 days after the date on which RD 539 was issued. Although the application is therefore untimely pursuant to section 45(2) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), given the seriousness of the allegations, the Board has determined that it is appropriate to grant an extension of the time limit pursuant to section 46 of the *Regulations* and to consider the merits of the applicant's allegations.

B–Allegation That the Board Should Not Have Dealt With all of the Complaints in one Decision

[6] Between January 14, 2009 and February 27, 2009, the Board received similar complaints and petitions from more than 200 Air Canada employees, which were consolidated as Board file no. 27266-C. Between March 27 and March 31, 2009, the Board received another 20 similar complaints that were consolidated as Board file no. 27446-C. The complaint filed by Mr. Beaulieu was part of Board file no. 27266-C. All of the complaints alleged that the IAMAW had breached section 37 of the *Code* when it negotiated and entered into the MOA with Air Canada and Aveos

dated January 8, 2009. This MOA was a comprehensive document aimed at dealing with the consequences of the sale of Air Canada's maintenance, repair and overhaul business and the transition of employees to the new employer.

[7] The applicant contends that the Board should have treated each complaint individually, as each complainant had provided his or her own reasons and evidence in his or her complaint and they were entitled to be treated individually.

[8] Section 20 of the *Regulations* provides the Board with the authority to consolidate proceedings:

> 20. The Board may order, in respect of two or more proceedings, that they be consolidated, heard together or heard consecutively.

[9] For reasons of economy and efficiency, it is the Board's practice to consolidate complaints involving the same parties that are based on similar facts. The reconsideration panel can find no error of law or policy and no denial of natural justice in the fact that this practice was followed in the case of Board file nos. 27266-C and 27446-C. Faced with more than 200 similar complaints involving the same union and employer and the same factual basis and having reviewed all of the written submissions, it was not unreasonable or illegal for the Board to have proceeded as it did.

C–Allegation That the Board Failed to Seek a Legal Opinion Regarding the Sale of Air Canada Technical Services to Aveos

[10] The applicant argued that the Board ought to have obtained a legal opinion itself in order to examine whether the corporate transaction at the heart of the complaints violated the *ACPPA*. The original panel fully dealt with this "legality" argument by explaining it was not the appropropriate forum in which to consider an outside statute like the *ACPPA*:

> [68] Most of the complainants allege that the October 2007 sale was a breach of the *ACPPA* and, therefore, illegal in their view. Nothing in the *Code* prevents an employer from selling all or part of its business. The Board has no jurisdiction under the *Code* to allow or disallow a sale of business. This Board is not, therefore, the proper forum in which to seek a determination of the legality of the October 2007 sale; the Board has no jurisdiction or power to make such a determination under the *Code* generally or in the context of a section 37 complaint against a union specifically. A complaint under section 37 of the

> *Code* is a complaint against a union; it is not a complaint against an employer. An employer is not a respondent to a duty of fair representation complaint against a union. The Board only has the power under section 37 of the *Code* to examine, in certain contexts, the actions of a union. The union was not a party to the October 2007 sale of ACTS. Accordingly, the Board cannot make any determinations involving the ACPPA.
>
> (RD 539)

[11] The obtaining of a legal opinion, which is evidently not the Board's obligation but is rather that of the parties in the adversarial process, would in any event have been irrelevant given that the subject matter itself fell outside the Board's jurisdiction in the context of a duty of fair representation complaint.

[12] Accordingly, the applicant has not convinced the Board that any error of law was made in the decision under review or that there was any obligation on the Board's part to obtain a legal opinion on the subject of the sale of business.

D–Allegation That the Board was Required to Hold a Hearing

[13] The applicant alleges that the Board did not consider his request that an oral hearing be held to hear arguments regarding the numerous duty of fair representation complaints that had been filed, and that this would have permitted the complainants to be heard.

[14] The Board is not obliged to hold an oral hearing in every case. Section 16.1 of the *Code* provides:

> 16.1 The Board may decide any matter before it without holding an oral hearing.

[15] It is not the Board's practice to hold oral hearings in every case. The Board will normally not hold an oral hearing unless there are issues of credibility or other sound industrial relations reasons that require it to hear the witnesses in person. There is no requirement for the Board to give notice to the parties of its intention not to hold a hearing (see *NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada* v. *International Brotherhood of Electrical Workers, Local 2228*, 2001 FCA 30). Information Circular No. 4, posted on the Board's website, advises complainants that:

> ...The Board makes the decision as to whether to hold an oral hearing on the basis of the documents on file and the written representations of the parties. **It is therefore in the best interest of the parties to file full, accurate and detailed submissions in support of their respective positions**. A party requesting that a hearing be held in a matter must include detailed reasons why they think a hearing is required.
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> (emphasis added)

[16] In the matters under review, the Board invited the parties to submit written responses and replies to the complaint. The applicant in this matter in fact filed a written reply to the employer and union responses on March 30, 2009. Having reviewed all of the written documentation, the Board determined that it was not necessary to conduct an oral hearing, and that the matters could be decided on the basis of the written submissions.

[17] As the Board was under no obligation to conduct an oral hearing and the applicant was heard by means of the written reply that he submitted on March 30, 2009, the Board can find no error of law or denial of natural justice in the fact that the Board exercised its discretion not to hold an oral hearing in this case.

E–Perceived Conflict of Interest and Apprehension of Bias

[18] The applicant alleges that there is a perceived conflict of interest on the part of two members of the original panel, owing to the fact that they had, in the past, held positions with either the respondent union and/or the employer. Allegations of this nature are serious and cannot be taken lightly, as they call into question not only the personal integrity of the individuals, but also the integrity of the Board. The issue of perceived conflict of interest or reasonable apprehension of bias was summarized by the Board in *Emerald Transport, Division of Emerald Agencies Inc.*, 2000 CIRB 91, as follows:

> [28] The "test" or standard for determining the disqualification of a panel of the CIRB is that of "reasonable apprehension of bias," which the applicant (Emerald) bears the onus of establishing. This is an objective test, based on whether a reasonable, well-informed person considering all the facts would conclude that there is a real likelihood the decision-maker will favour one party over the other.

> Proof of actual bias is not necessary. Rather, the possibility or likelihood of prejudice in the eyes of reasonable people is what matters. However, a reasonable apprehension of bias is a question of fact, necessitating an examination of the full circumstances and their specific context.

[19] The Board is a representative board. It was described in *Emerald Transport, Division of Emerald Agencies Inc.*, *supra*, as follows:

> [22] On January 1, 1999, the Canada Industrial Relations Board (hereinafter the "CIRB") was established as a representative board. The Board is responsible for the interpretation, application and administration of the *Code*. Its full-time complement includes its Chairperson, presently four Vice-Chairpersons, and the maximum of six members of whom three are representative of employees and three of employers. There are also six part-time members of whom equal numbers are representative of employees and employers. All Board members are appointed by the Governor in Council for fixed terms to hold office "during good behaviour." In addition, they are subject to "remedial or disciplinary measures" if found by a formal inquiry "incapacitated from the proper execution of that office by reason of infirmity," "guilty of misconduct," having "failed in the proper execution of that office" or having been placed "by conduct or otherwise, in a position that is incompatible with the due execution of that office."
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> [23] Matters coming before the Board may be determined by the Chairperson or a Vice-Chairperson alone or by a tripartite panel comprising either the Chairperson or a Vice-Chairperson together with at least one employee representative and one employer representative. Under section 12.01(1) of the *Code*, the Chairperson has "supervision over and direction of the work of the Board, including the assignment and reassignment of matters that the Board is seized of to panels" and "the composition of panels and the assignment of Vice-Chairpersons to preside over panels."

[20] In *TELUS Communications Inc.*, 2001 CIRB 125, the Board looked at the issues of work experience and the time elapsed since certain members of the panel had been appointed. It stated the following:

> [9] Every member, including every vice-chairperson, has worked with various organizations and employers in order to obtain the expertise required to properly and competently discharge the duties of the adjudicative positions into which they have been appointed. All the Board members have many decades of experience that often include several organizations, employers, industries and professional affiliations on both a local and national level.
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> [10] The Board has taken this preliminary objection extremely seriously, given that the questions implicit in the challenge to the constitution of the panel strike at the very root of the representative structure that Parliament has determined should be applied to the Canada Industrial Relations Board. It has significant implications on the ability of the Board to effectively deal with the hundreds of applications that are filed with the Board each year. Nonetheless, the Board is aware of the pitfalls implicit in a representative Board. The Board has already had a previous opportunity to review the issue in detail involving another Member. In that case this Vice-Chairperson, writing on behalf of another panel of the Board, made a determination on apprehension of bias in which the reasonable apprehension was found to exist (see *Dynamex Canada Inc.*, April 9, 2001 (CIRB LD 432)).

> [11] The issue, as correctly categorized by the union's counsel, is the issue of *remoteness*, in relation to the perceived affiliation that could be viewed as affecting one's objectivity in adjudication. Is one year affiliation to be considered too close? Is three years too close? Five years or twenty years too close? When is an affiliation with a particular party or individual too close? Does one's previous membership or involvement in an organization or with certain individuals automatically raise the spectre of bias? **The existence of these general past connections do not translate into a reasonable apprehension of bias, without more. There must be a specific basis grounded in fact upon which to justify a concern**.
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> (emphasis added)

[21] The applicant has not suggested that any of the panel members had a personal relationship with any of the parties to the original complaints or had any personal interest in the outcome of those complaints. The application for reconsideration simply states that, because two of the three members of the original panel worked for either the IAMAW or the employer at some time in the past, the applicant was of the opinion that there was an appearance of conflict of interest on their part.

[22] The Board is an expert administrative tribunal. The raison d'être for the appointment of persons with a background in labour relations to the Board is to enable them to use their knowledge and experience to render informed decisions. The *Code* expressly provides that tripartite Board panels will have an employer and an employee representative. These representative members are appointed precisely because of their past experience and expertise in labour relations. Nevertheless, to avoid any apprehension of bias, representative members are normally not appointed to hear any case involving a former employer for a period of at least two years from the date on which they join the Board. Representative members are not appointed to any matter in which they have had a direct interest at any time in the past.

[23] In this case, one of the two panel members in question did indeed work for both Air Canada and the IAMAW during the course of his career and the other worked for Air Canada in different capacities over a period of time. However, at the time that the original complaints were heard, the first member had been with the Board since March 1999 (that is, more than 10 years) and the other had been a Board member since April 2005 (that is, more than five years).

[24] In the Board's opinion, the length of time that had passed since either of these members worked for the IAMAW or Air Canada is sufficient to overcome any concern regarding a possible apprehension of bias. Further, the applicant did not provide any specific example of a fact or circumstance casting doubt on the objectivity of the two members in question.

[25] For all of these reasons, the Board dismisses the application for reconsideration of RD 539.

[26] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Graham J. Clarke
Vice-Chairperson

Louise Fecteau
Vice-Chairperson